JUDGMENT OF THE COURT OF FIRST INSTANCE (First Chamber)
24 September 1998 *

In Case T-112/95,

Peter Dethlefs and 38 other farmers, residing in Germany, represented by Bernd Meisterernst, Mechtild Düsing, Dietrich Manstetten, Frank Schulze and Winfried Haneklaus, Rechtsanwälte, Münster, with an address for service in Luxembourg at the Chambers of Dupong & Dupong, 4-6 Rue de la Boucherie,

applicants,

v

Council of the European Union, represented by Arthur Brautigam, Legal Adviser, acting as Agent, with an address for service in Luxembourg at the office of Alessandro Morbilli, Manager of the Legal Affairs Directorate of the European Investment Bank, 100 Boulevard Konrad Adenauer,

and

Commission of the European Communities, represented by Dierk Booß, Legal Adviser, acting as Agent, assisted by Hans-Jürgen Rabe and Georg M. Berrisch, Rechtsanwälte, Hamburg and Brussels, with an address for service in Luxembourg at the office of Carlos Gómez de la Cruz, of its Legal Service, Wagner Centre, Kirchberg,

defendants,

* Language of the case: German.

APPLICATION under Articles 178 and 215, second paragraph, of the EC Treaty seeking to have the defendants ordered to pay interest at the rate of 8% per annum on the amount of compensation paid to the applicants pursuant to Council Regulation (EEC) No 2187/93 of 22 July 1993 providing for an offer of compensation to certain producers of milk and milk products temporarily prevented from carrying on their trade (OJ 1993 L 196, p. 6), together with default interest on the amounts thus calculated.

THE COURT OF FIRST INSTANCE
OF THE EUROPEAN COMMUNITIES (First Chamber),

composed of: B. Vesterdorf, President, R. M. Moura Ramos and P. Mengozzi, Judges,

Registrar: J. Palacio González, Administrator; subsequently B. Pastor, Principal Administrator,

having regard to the written procedure and further to the hearings on 14 January 1998 and 2 April 1998,

gives the following

Judgment

Legal background

1 By judgment of 19 May 1992 in Joined Cases C-104/89 and C-37/90 *Mulder and Others* v *Council and Commission* [1992] ECR I-3061 (hereinafter '*Mulder*'), the

Court held the Community liable for damage caused to certain milk producers who had been prevented from marketing milk as a result of the application of Council Regulation (EEC) No 857/84 of 31 March 1984 adopting general rules for the application of the levy referred to in Article 5c of Regulation (EEC) No 804/68 in the milk and milk products sector (OJ 1984 L 90, p. 13), by reason of undertakings which they had given under Council Regulation (EEC) No 1078/77 of 17 May 1977 introducing a system of premiums for the non-marketing of milk and milk products and for the conversion of dairy herds (OJ 1977 L 131, p. 1).

2 In view of the large number of producers concerned by *Mulder*, and in order to give full effect to that judgment, the Council adopted Regulation (EEC) No 2187/93 of 22 July 1993 providing for an offer of compensation to certain producers of milk and milk products temporarily prevented from carrying on their trade (OJ 1993 L 196, p. 6). The Regulation provides for a flat-rate payment by way of compensation to be offered to producers who, in certain circumstances, suffered damage as a result of the application of the rules referred to in *Mulder*.

3 Regulation No 2187/93 provides, in particular, that the national authorities are, in the name and on behalf of the Council and the Commission, to make an offer of compensation to the producers. Under Article 14, final paragraph, acceptance of the offer is constituted by the return to the competent authority, within two months of receiving the offer, of the receipt, duly approved and signed, and it implies the relinquishment of any claim of whatever nature against Community institutions in respect of any loss within the meaning of Article 1 of the Regulation. If the offer is not accepted within two months of its receipt, it is not binding in the future on the Community institutions concerned (Article 14, third paragraph).

4 Article 12 provides that the amount of compensation is to be increased by default interest of 8% per annum until the compensation is paid.

5 The standard form for the receipt in full and final settlement, referred to in Article 14, was set out in Commission Regulation (EEC) No 2648/93 of 28 September 1993 laying down detailed rules for the application of Regulation No 2187/93 (OJ 1993 L 243, p. 1).

6 The receipt reads as follows:

'I, ..., the undersigned, hereby declare that the offer of compensation made on ... in the sum of ... is accepted in respect of injury incurred as a result of my participation in the non-marketing/conversion scheme introduced by Council Regulation (EEC) No 1078/77 ... and I expressly renounce any present or future claim in the matter, on my part or that of any of my assignees or beneficiaries.'

Facts

7 The applicants are milk producers in Germany who gave undertakings under Regulation No 1078/77 and who were prevented from resuming the marketing of milk as a result of the application of Regulation No 857/84.

8 By applications lodged at the Registry of the Court of Justice between 30 March 1990 and 12 December 1990, they brought actions for compensation against the Council and the Commission. By order of the Court of Justice of 27 September 1993, those cases were transferred to the Court of First Instance, following the enlargement of its jurisdiction by Council Decision 93/350/Euratom, ECSC, EEC of 8 June 1993 amending Council Decision 88/591/ECSC, EEC, Euratom establishing a Court of First Instance of the European Communities (OJ 1993 L 144, p. 21).

9 Following the entry into force of Regulation No 2187/93, the applicants received offers of compensation from the competent national authority between 22 November 1993 and 6 February 1994.

10 The amount of compensation proposed in those offers included interest at the rate of 8% per annum for the period between 19 May 1992, the date on which the judgment in *Mulder* was delivered, and 30 September 1993. It was made clear that additional interest at the same rate would be paid in respect of the period from 1 October 1993 until the date on which the compensation was paid. All the applicants accepted the offer within the period prescribed.

11 On signing the receipts annexed to the offers, which were drawn up in accordance with the model set out in the German-language version of Regulation No 2648/93, the applicants informed the Court on 20 April 1994, or, in the case of Mr Gövert, the applicant in Case T-62/93, on 9 May 1994, that they wished to discontinue their actions. At the same time, they asked for costs to be awarded against the defendants, pursuant to Article 87(5) of the Rules of Procedure.

12 The Commission took the view that an application for costs under Article 87(5), first paragraph, second sentence, of the Rules of Procedure was in breach of the obligation under Article 14, fourth paragraph, of Regulation No 2187/93 to relinquish all claims. It therefore advised the German authorities to take no steps to pay compensation in any of those cases.

13 Three of the applicants in the present case — Mr Backhaus, Mr Lorentz and Mr Mittwede — who had brought actions in Cases T-66/93, T-115/93 and T-69/93 respectively thereupon withdrew their applications for costs on 14 and 15 June 1994. Their compensation was paid in July 1994.

14 Meanwhile the Commission had decided to make payment of the compensation contingent on withdrawal of only the actions for damages, and not the applications for costs.

15 On 27 July 1994 the German authorities informed the applicants that the Commission was not going to make payment of the compensation dependent on withdrawal of the applications for costs, but only on discontinuance of the actions.

16 On 2 August 1994 the applicants informed the German authorities that they had discontinued their actions. The compensation was then paid.

17 On the basis of Article 12 of Regulation No 2187/93, the compensation included interest in respect, first, of the period between 19 May 1992, the date of the judgment in *Mulder*, and the expiry of the acceptance period notified to each of the applicants and, second, of the period from 4 August 1994 — or, in the case of Mr Backhaus, Mr Lorentz and Mr Mittwede, from 29 June 1994 — until the date on which each compensation amount was paid (29 June 1994 and 4 August 1994 being the dates on which the national authorities had been informed that the actions had been discontinued).

18 By letter of 13 January 1995 the applicants sought payment from the Commission of interest in respect of the period not covered by the compensation which they had received. By letter of 6 March 1995 the Commission rejected that request.

Procedure and forms of order sought

19 The application was lodged at the Registry of the Court of First Instance on 8 May 1995.

20 By document lodged on 21 June 1995 the Council raised an objection, by way of a preliminary plea, as to the admissibility of the action, on the ground that it could not be liable for the alleged damage. On 16 October 1995 the applicants lodged their observations in that regard.

21 By order of 13 May 1996 the Court of First Instance ordered that the decision on the preliminary plea of inadmissibility be reserved for the final judgment.

22 Upon hearing the report of the Judge-Rapporteur, the Court of First Instance decided to open the oral procedure without any preparatory measures of inquiry. However, the parties were asked to provide the Court with certain documents.

23 The parties presented oral argument at the hearing on 14 January 1998.

24 Since a member of the Chamber was prevented from attending, the President of the Court of First Instance designated another Judge to complete the Chamber, in accordance with Article 32(3) of the Rules of Procedure.

25 Having regard to Article 33(2) of the Rules of Procedure, the Court of First Instance (First Chamber), in its new composition, ordered the reopening of the oral procedure by order of 13 March 1998, pursuant to Article 62 of those Rules. The parties did not attend the new hearing on 2 April 1998.

26 The applicants claim that the Court should:

— order the defendants jointly and severally to pay interest at the rate of 8% per annum on the compensation which was paid to them under Regulation No 2187/93 in respect of the period between the expiry of the two-month period set by Article 14 of the Regulation and 29 June 1994, in the case of Mr Backhaus, Mr Lorentz and Mr Mittwede, and 3 August 1994 in the case of all the other applicants, together with interest at the rate of 8% on the resulting amounts as from the date of delivery of the judgment;

— order the defendants to pay the costs.

27 The Council contends that the Court should:

— dismiss the action as inadmissible in so far as it is directed against the Council or, in the alternative, as unfounded;

— order the applicants to pay the costs.

28 The Commission contends that the Court should:

— dismiss the action as unfounded;

— order the applicants to pay the costs.

Admissibility

Arguments of the parties

29 The Council contends that it has no powers in respect of the national authorities responsible for applying Community law. Since the damage allegedly suffered by the applicants is a result of the application of Regulation No 2187/93 by the national authorities, it can only be attributed to the latter, if they were acting on their own initiative and responsibility, or to the Commission, if it issued unlawful instructions to them.

30 It is settled law that in such circumstances the Council cannot represent the Community before the Court, since it did not cause the damage alleged (Joined Cases 63/72 to 69/72 *Werhahn and Others* v *Council* [1973] ECR 1229).

31 The applicants maintain that the Council's objection is unfounded. The action concerns a portion of the compensation to which they are entitled under Regulation No 2187/93, which was adopted by the Council. Furthermore, the offers of compensation were made to the applicants in the name and on behalf of the Council and the Commission, and in all correspondence exchanged with the applicants the German authorities represented those institutions. The Council cannot purport to be unaware of those facts and the action brought against it is therefore admissible.

Findings of the Court

32 The essential point at issue between the parties is whether the interest becomes payable merely upon signature of the receipt — that being a pre-condition for payment of the compensation making good the damage referred to in Article 1 of the Regulation — or not until the relevant actions have been discontinued. Thus the present proceedings concern the interpretation of Regulation No 2187/93 and its effects.

33 Regulation No 2187/93 was adopted by the Council. As stated in the second and fourth recitals in the preamble thereto, it aims, in compliance with the judgment in *Mulder*, to compensate producers who suffered damage on account of the fact that they were prevented from producing milk by virtue of an undertaking given under Regulation No 1078/77. In *Mulder*, both the Commission and the Council were ordered to compensate the producers concerned. Thus the present action turns on the interpretation of legislation which was intended to give full effect to the order to make good damage for which the Council was partly responsible.

34 The argument alleging fault on the part of the national authorities is unfounded. It is clear from Regulation No 2187/93 that action by those authorities is taken in the name and on behalf of the Council and the Commission and that it is confined to the administrative aspects of receiving and handling applications, and arranging the offers. The applicants do not allege any fault on the part of those authorities. On the contrary, they directly contest the interpretation of the scope of the defendants' obligations under Regulation No 2187/93. The fact that the Council had no part in drawing up the offer in fulfilment of those obligations because of the way in which powers were allocated under the Regulation does not enable it to plead inadmissibility in respect of an action concerning the interpretation and effects of a regulation which it adopted and which imposed upon it certain obligations which it is alleged to have disregarded.

35 In those circumstances, the plea of inadmissibility raised by the Council must be rejected.

Substance

Arguments of the parties

36 In support of their action, the applicants put forward a single plea in law, alleging infringement of Article 12 of Regulation No 2187/93. That plea is divided into two parts.

The first part of the plea in law: Article 12 of Regulation No 2187/93 creates a direct entitlement to the payment of interest

37 The applicants maintain that Article 12 of Regulation No 2187/93 provides that the amount of the compensation is to be increased by interest at the rate of 8% for the period from 19 May 1992 until the compensation is paid, provided only that the offer is accepted within the time-limit.

38 Nor do the offers made to the applicants specify that their actions must be discontinued. That requirement was thus not laid down by the Commission until after the offers had been been sent. It was not until 27 July 1994 that the applicants were told of the need to discontinue their actions.

39 The applicants argue that the signing of the receipt signifies relinquishment of all substantive claims against the Community. The effects of discontinuing the actions, on the other hand, are purely formal. Furthermore, it is clear from Article 98 of the Rules of Procedure that, since each applicant had lodged a declaration discontinuing the action at the Registry of the Court of First Instance, the Commission could have secured the removal of the cases in question from the register.

40 The applicants admit that acceptance of the offer rendered their actions devoid of purpose. However, they had not thereby undertaken to discontinue their actions immediately or to withdraw their applications for costs.

41 In any case, the Commission was made aware of the date on which the actions were discontinued as soon as the Registry of the Court of First Instance asked it to submit its observations in that regard, which it did on 9 June 1994. Accordingly, the choice of 4 August as the date for recommencing the calculation of the interest is arbitrary, since it merely marks the point by which the applicants had notified the national authorities that their actions had been discontinued. Moreover, Regulation No 2187/93 does not require notification to be given to those authorities.

42 Even if the Commission's argument were accepted, the decisive dates are those on which the actions were discontinued — acts which are unconditional, irrevocable and incontestable — the last of which was 9 May 1994.

43 Contrary to the Commission's contention, the fact that the interest at issue was default interest did not mean that, so long as the applicants did not discontinue their actions, there was no question of late payment. It is settled law (*Mulder*, paragraph 35) that default interest applies when the obligation to make good damage is recognised in a judgment. Furthermore, Article 12 of Regulation No 2187/93 refers to *Mulder*, which is why the interest was calculated with effect from 19 May 1992.

44 The defendants contend that the action is unfounded, since the applicants relinquished their rights and are themselves exclusively responsible for the alleged delay in payment.

45 It follows from Article 14 of Regulation No 2187/93 that, in accepting the offer of payment of flat-rate compensation, the applicants gave a general discharge, irrevocably relinquishing their right to bring further actions, including claims for the payment of interest. They cannot therefore claim compensation in excess of that already offered and accepted. Consequently, the action is unfounded.

46 Furthermore, Article 12 of Regulation No 2187/93 provides for the payment of default interest. The interest claimed in the present case, however, relates to a delay in payment for which the applicants themselves are exclusively responsible.

47 The defendants maintain that, at the same time as the applicants relinquished all rights of action, they should have withdrawn all pending actions for compensation. Their failure to do so constitutes breach of the obligation to withdraw, which arises directly from Article 14 of the Regulation. Thus, contrary to their statements, the applicants did not learn of the withdrawal requirement by letter of 27 July 1994 from the national authorities. Given that breach of an undertaking, the German authorities were entitled to refuse payment of the compensation until such time as they received notification that the actions had been withdrawn.

48 The Commission's refusal to pay the compensation was not linked to the applications for costs made by the applicants. With effect from July 1994, the Commission had no longer made payment of compensation contingent on withdrawal. The applicants who had not withdrawn their applications for costs had been paid interest like the others. In every case, the calculation of interest recommenced from the date of notification of discontinuance. Therefore no applicant had suffered damage on account of the fact that the Commission initially required the applications for costs to be withdrawn.

49 In any event, the amount of interest claimed by several of the applicants has been wrongly calculated.

The second part of the plea in law: there is a contractual right to the payment of interest

50 The applicants allege that the rights on which they rely derive from the offers of compensation which they received. The relinquishment of all rights of action referred to in the receipts signed by the applicants concerns only claims which were not covered by the settlement. The rights relied upon in the present case, however, derive from that settlement.

51 The offers of compensation accepted provided that the amount of compensation was to be increased by interest at the rate of 8% for the period between 1 October 1993 and the date on which compensation was paid. Consequently, acceptance of the offer gave the applicants a right under that contract to the interest claimed.

52 The applicants accept the adjustments made by the Commission to the calculation of the interest in a number of cases.

53 The defendants maintain that, since the action was brought under Articles 178 and 215, second paragraph, of the Treaty, the jurisdiction of the Court of First Instance is based exclusively on the Community's non-contractual liability. The applicants' arguments alleging breach by the institutions of the contract resulting from the acceptance of the flat-rate offer cannot therefore be accepted. In any case, according to the defendants, the applicants were in breach of their contractual obligation to relinquish all rights of action.

Findings of the Court

54 It must be emphasised, first of all, that Regulation No 2187/93 lays down the conditions governing offers of compensation such as those addressed to the applicants, together with all the information needed to calculate the amounts offered. Since those offers result directly from the Regulation, they are not independent of that measure.

55 Whether non-contractual liability has been incurred, as alleged by the applicants in the second part of their plea in law, depends therefore on the interpretation of the rules laid down in the Regulation for compensating milk producers. However, in so far as the compensation arrangements laid down therein were intended to discharge the obligations arising from the findings made against the Community institutions in *Mulder*, application of the Regulation falls within the domain of the Community's non-contractual liability. Accordingly, both parts of the plea in law must be considered together.

56 The plea concerns the scope of the obligations resulting, for those receiving an offer of compensation under Regulation No 2187/93, from their acceptance of the offer and signing of the receipt in the form set out in Regulation No 2648/93 and, in particular, the question whether there is an obligation to discontinue any actions pending.

57 In order to determine the scope of those obligations, it is necessary to consider the objectives pursued by the institutions and the context in which Regulation No 2187/93 was adopted (Case 292/82 *Merck* [1983] ECR 3781, paragraph 12, and Case C-136/91 *Findling Wälzlager* [1993] ECR I-1793, paragraph 11).

58 It is clear from the recitals in the preamble to Regulation No 2187/93 that the institutions recognised that, as a result of *Mulder*, a very large number of producers were entitled to compensation and that it would be impossible for them to take into account the individual situation of each producer. They therefore decided to provide by regulation for offers of compensation, acceptance of which would entail — by virtue of Article 14, last paragraph, of the Regulation — relinquishment of any claim of whatever nature against the Community institutions (see Case T-541/93 *Connaughton and Others* v *Council* [1997] ECR II-549, paragraph 31).

59 In the Court's view, the producers' relinquishment of all claims cannot also apply, as the defendants maintain, to the consequences of a breach by the institutions of their obligations under the Regulation.

60 As the Court of First Instance has already found, Regulation No 2187/93 was not a measure binding on the producers, in so far as it embodied a proposal for a settlement, acceptance of which was optional and which constituted an alternative to their right to bring an action for compensation for the damage suffered (*Connaughton*, cited above, paragraph 35). In that context, relinquishment of all claims was the condition attached by the institutions to the option available to producers of receiving compensation immediately, without having to await a judicial ruling.

61 In that regard, it is common ground that when Regulation No 2187/93 was adopted a large number of producers, including the applicants, had already brought actions for compensation against the Council and the Commission.

62 It is thus clear from all the provisions governing the offer of compensation that their purpose was to restrict the number of judicial proceedings in relation to this matter.

63 The obligations incumbent on the parties under Regulation No 2187/93 and the terms of the receipt must be examined in the light of that conclusion.

64 First, having regard to the terms of the receipt, the producers who had accepted the offer but not yet brought proceedings before the Community judicature relinquished their right to bring claims for compensation.

65 Secondly, in the case of those producers who had already brought actions by the time Regulation No 2187/93 entered into force, discontinuance was the sole means of achieving the objective in question.

66 This is confirmed by the wording of the receipt, according to which acceptance of the offer entails the express relinquishment of 'any present ... claim in the matter', use of the adjective 'present' signifying discontinuance of actions pending.

67 It follows that acceptance of compensation proposed under Regulation No 2187/93 by signing the related receipt placed the applicants under an obligation — which, moreover, they did not contest — to discontinue any actions pending.

68 The defendant institutions were therefore also entitled to make payment of the compensation contingent on discontinuance of those actions.

69 In those circumstances, the institutions concerned were also entitled to suspend payment of the interest provided for in Article 12 of Regulation No 2187/93, so long as the applicants had not fulfilled their obligation to discontinue.

70 The precise time at which the applicants fulfilled that obligation must therefore be established. Contrary to the Commission's contention, this was not the moment when the German authorities were informed of the withdrawals, namely 4 August 1994, or, in the case of Mr Backhaus, Mr Lorentz and Mr Mittwede, 29 June 1994. Discontinuance takes effect from the date on which notification of discontinuance, in accordance with Article 99 of the Rules of Procedure, is lodged at the Registry of the Court of First Instance. The communication to the national authorities, which is moreover not provided for by Regulation No 2187/93, is irrelevant in this context.

71 It should be noted that the Registry of the Court of First Instance communicated the applicants' discontinuance to the defendants and that the latter, by letters of 6 and 9 June 1994, submitted their observations in that regard. The defendants were thus made aware at that point that the condition on which payment of compensation depended had been satisfied; they were also apprised of the date on which that occurred.

72 For the majority of the applicants, therefore, that condition was satisfied on 20 April 1994, the date on which their notifications of discontinuance were registered at the Court of First Instance. In the case of Mr Gövert, the condition was fulfilled on 9 May 1994 (see paragraph 11 above).

73 It follows that the claims for interest made by the applicants are partly well founded. The defendants must pay interest on the compensation paid to the applicants at the rate of 8% per annum in respect of the period between 20 April and 3 August 1994, the eve of the date from which interest has already been paid. In the case of Mr Backhaus, Mr Lorentz and Mr Mittwede, the interest is payable for the

period between 20 April and 28 June 1994 (see paragraph 17 above). Lastly, Mr Gövert, who discontinued his action on 9 May 1994 (see paragraph 11 above), must be paid interest for the period between 9 May and 3 August 1994.

74 The applicants also claim payment of interest at the rate of 8% per annum on the amounts claimed. The Court considers that default interest at the rate of 6% per annum should be paid on the sums payable by the defendant institutions as from the date of this judgment, which moreover is the rate which the defendants themselves proposed.

Costs

75 Under Article 87(3) of the Rules of Procedure, where each party succeeds on some and fails on other heads, the Court may order that the costs be shared. Since both the applicants and the defendants have been partly unsuccessful in their pleadings, it is appropriate to apply that provision in the present case.

On those grounds,

THE COURT OF FIRST INSTANCE (First Chamber)

hereby:

1. **Orders the defendants to pay the applicants Günter Backhaus, Uwe Lorentz and Manfred Mittwede in respect of the period between 20 April and 28 June 1994 interest at the rate of 8% per annum on the compensation paid to**

them under Council Regulation (EEC) No 2187/93 of 22 July 1993 providing for an offer of compensation to certain producers of milk and milk products temporarily prevented from carrying on their trade;

2. Orders the defendants to pay the applicant Paul Gövert in respect of the period between 9 May and 3 August 1994 interest at the rate of 8% per annum on the compensation paid to him under that regulation;

3. Orders the defendants to pay to all the other applicants in respect of the period between 20 April and 3 August 1994 interest at the rate of 8% per annum on the compensation paid to them under that regulation;

4. Orders interest at the rate of 6% per annum to be paid on those amounts with effect from the date of this judgment;

5. Orders each of the parties to bear his own costs.

Vesterdorf Moura Ramos Mengozzi

Delivered in open court in Luxembourg on 24 September 1998.

H. Jung B. Vesterdorf

Registrar President